

June 23, 2016

The Honorable Bill Walker  
Governor of the State of Alaska  
Office of the Governor  
P.O. Box 110001  
Juneau, AK 99811-0001

Re: Ability to surrender the State's taxing power

Dear Governor Walker:

You asked whether the State of Alaska, by legislation or contract, can bind the State to a tax structure for a proposed Alaska North Slope liquefied natural gas project and thereby prevent future legislatures from amending that tax structure. The short answer is that it cannot. Under article IX, section 1 of the Alaska Constitution, the sovereign power of taxation cannot be completely surrendered by an irrevocable legislative tax structure or contract.

### ANALYSIS

Whether the State may bind future legislatures to a tax structure and prevent any future changes to that tax structure turns on the interpretation of article IX of the Alaska Constitution. Article IX's provisions must be understood as a response to U.S. Supreme Court decisions holding that a state's surrender of its taxation power is binding and enforceable against future legislatures. Under these decisions, once a state's legislature had granted a tax exemption to a favored industry, the exemption was held contractually binding, severely hampering future legislatures' power to meet their states' changing financial needs. With this danger in mind, the drafters of Alaska's constitution wrote article IX to expressly prohibit the surrender of the State's taxing power and to allow the suspension or contracting away of the power of taxation through tax exemptions granted only by "general law." The text and history of article IX make clear that no legislature or administration can create a permanent tax exemption. Rather, any tax exemption that is granted can always be amended or repealed by a future legislature at any time.

**I. State constitutional provisions that prohibit surrender of the taxing power, like Alaska's, were drafted to ensure that states retain the power to change their tax policies without running afoul of the federal constitution's contract clause.**

The contract clause of the federal constitution provides that “[n]o state shall . . . pass any . . . law impairing the obligation of contracts.”<sup>1</sup> This clause was intended to “remedy a particular social evil—the state legislative practice of enacting laws to relieve individuals of their obligations under certain contracts.”<sup>2</sup> Under this clause, states are prohibited from eliminating vested rights arising out of their contracts with private parties.<sup>3</sup> For purposes of the contract clause, “contracts” include statutes “when the language and circumstances evince a legislative intent to create private rights of a contractual nature enforceable against the State.”<sup>4</sup> One of the powers a state may contractually limit, if it does so in clear and unequivocal terms, is the power to tax.<sup>5</sup>

The federal constitution's protection of contractually granted tax exemptions—and its resulting limitation on a state's ability to change tax policies—led many states, including Alaska, to adopt constitutional provisions designed to prevent surrender of the state taxing power.<sup>6</sup> These provisions ensure that while states can create tax exemptions, the exemptions can be repealed or amended by future legislatures, thereby protecting

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<sup>1</sup> U.S. Const. art. I, § 10.

<sup>2</sup> *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 256 (1978).

<sup>3</sup> *Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. 518 (1819).

<sup>4</sup> *United States Trust Co. v. New Jersey*, 431 U.S. 1, 18 (1977).

<sup>5</sup> *See Merrion v. Jicarilla Apache Mountain Tribe*, 455 U.S. 130, 148 (1982) (“[T]he government's power to tax remains unless it has been specifically surrendered in terms which admit of no other reasonable interpretation.”); *Jefferson Branch Bank v. Skelly*, 66 U.S. 436, 446 (1861) (stating that sovereign powers, including the right of taxation, can only be surrendered when “surrender has been expressed in terms too plain to be mistaken”).

<sup>6</sup> *E.g.*, Ariz. Const. art. IX, § 1 (“The power of taxation shall never be surrendered, suspended or contracted away.”); Ga. Const. art. VII, § 1(1) (“The state may not suspend or irrevocably give, grant, limit, or restrain the right of taxation and all laws, grants, contracts, and other acts to effect any of these purposes are null and void.”); Me. Const. art. 9, § 9 (“The Legislature shall never, in any manner, suspend or surrender the power of taxation.”); Mich. Const. art. 9, § 2 (“The power of taxation shall never be surrendered, suspended or contracted away.”). Similar provisions can be found in state constitutions for Minnesota, Montana, New Jersey, New York, Idaho, and Texas.

maximum flexibility and authority to revise tax policies to meet changing economic conditions. Courts have routinely held that these constitutional provisions prevent the creation of irrevocable, permanent tax exemptions.<sup>7</sup> As a result, when a state enacts a constitutional prohibition against surrendering the power to tax, it allows successive legislatures to change tax policy without running the risk of violating the federal contract clause.

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<sup>7</sup> See e.g., *Sheehy v. Pub. Emps. Ret. Div.*, 864 P.2d 762, 766 (Mont. 1993) (stating that state constitution “prohibits the state from surrendering or contracting away the power to tax” and “the state cannot promise any group of taxpayers that it will never tax them”); *Parrish v. Emps' Ret. Sys.*, 398 S.E.2d 353, 354 (Ga. 1990) (stating that “since 1877, the Georgia General Assembly has had no power to grant an irrevocable tax exemption” or contract away the right to tax, and all parties are charged with knowledge of these constitutional limitations on the legislature); *Blair v. State Tax Assessor*, 485 A.2d 957, 960 (Me. 1984) (stating that even if a tax exemption was “a contractual right of state employment, the legislative grant of such a right would violate the Maine Constitution, which states: ‘The Legislature shall never, in any manner, suspend or surrender the power of taxation.’”); *Roosevelt Raceway, Inc. v. Monaghan*, 174 N.E.2d 71, 77 (N.Y. 1961) (holding that the constitution “prohibits any attempt to contract away the power of taxation unless sanctioned by the people themselves” through constitutional amendment); *Switzer v. Phoenix*, 341 P.2d 427, 431 (Ariz. 1959) (holding that “Art. IX, § 1, was adopted for the purpose of restricting the legislature's right to alienate the power to tax anything and all persons. The prohibition is against the irrevocable grant of immunity from taxation . . . [It] is a prohibition against the surrender or relinquishment of the right to impose a tax.”).

**II. The Alaska Constitution prohibits surrender of the power of taxation but allows tax incentives that are subject to change by future legislatures.**

Article IX of the Alaska Constitution must be interpreted against this backdrop and consistently with similar provisions in other states' constitutions that preclude a legislature from binding the hands of its successors.<sup>8</sup> The Alaska Constitution—in article IX, section 1—specifically provides that “[t]he power of taxation shall never be surrendered,” and only allows it to be “suspended or contracted away” as provided in that article.<sup>9</sup> Article IX, section 4 allows tax exemptions to the State and its political subdivisions, and for non-profit religious, charitable, cemetery, and educational purposes as provided by the legislature in state law. In addition, the legislature can grant “[o]ther exemptions of like or different kind . . . by general law.”<sup>10</sup> Read together, sections 1 and 4 allow the legislature to suspend or contract away the power of taxation by general law but not to surrender the power to tax. The legislature's suspension or contracting away of the taxing power through tax exemption by general law cannot be permanent or irrevocable by a future legislature. The power to tax is specifically preserved by the state constitution for future legislatures.<sup>11</sup>

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<sup>8</sup> See decisions, *supra* note 11.

<sup>9</sup> Alaska Const. art. IX, § 1 (“The power of taxation shall never be surrendered. This power shall not be suspended or contracted away, except as provided in this article.”).

<sup>10</sup> Alaska Const. art. IX, § 4. A general law addresses a matter of statewide concern, and would be applicable statewide and for a public purpose, as opposed to a special or local law. See Alaska Const. art. II, § 19 (providing that “[t]he legislature shall pass no local or special act if a general act can be made applicable”); Alaska Const. art. IX, § 6 (providing that “[n]o tax shall be levied, or appropriation of public money made, or public property transferred, nor shall the public credit be used, except for a public purpose”); *State v. Lewis*, 559 P.2d 630, 643 (Alaska 1977), *cert. denied*, 432 U.S. 901 (1977) (stating that general law addresses a matter of statewide concern); *Baxley v. State*, 958 P.2d 422, 430-31 (Alaska 1998) (finding that legislation modifying certain oil and gas leases was valid under section 19 because of the leases' unique nature and the substantial relation to legitimate state purposes); *Abrams v. State*, 534 P.2d 91, 94 (Alaska 1975) (stating that the question of whether legislation is general is determined by whether it is reasonably related to a matter of common interest to the whole state).

<sup>11</sup> This reading of article IX is further supported by the Alaska Constitution's prohibition against laws “making any irrevocable grant of special privileges or immunities.” Alaska Const. art. I, § 15. In addition, as a general matter, the Alaska Supreme Court has held that a legislature cannot bind future legislatures. See *Ross v. State, Dep't of Revenue*, 292 P.3d 906, 915 (Alaska 2012) (stating that “the passage of a

**III. The framers of the Alaska Constitution intended to authorize the legislature to grant tax incentives for economic development, while leaving as much leeway as possible to future legislatures.**

The drafters of the State constitution began with the National Municipal League Model State Constitution language for article IX, section 1: “The power of taxation shall never be surrendered, suspended or contracted away.”<sup>12</sup> A report provided to the delegates explained that the “important constitutional aspect of state taxation is the question of limiting the legislature’s power in this field.”<sup>13</sup> The wording of this particular provision in the Model was intended “to prevent the state from exempting, particularly by contract, individuals and corporations from taxation.”<sup>14</sup> The report expressed the concern that, without providing some limitations,

[i]n granting exemptions, one legislature may bind another and thereby lose for the state its power to tax. The exemption may, under certain conditions, result in a contract relationship that legislatures may not abrogate without violating the federal [contract clause]. To avoid such difficulties, a considerable number of states have constitutionally prohibited the surrendering or contracting away of the taxing power.<sup>15</sup>

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statute is not an assertion by one legislature that a subsequent legislature will not later amend the statute”); *see also Weiss v. State*, 939 P.2d 380, 397 (Alaska 1997) (stating that “one legislature cannot abridge the power of a succeeding legislature” and holding that contract could not bind future legislatures); *Mount Juneau Enters., Inc. v. City and Borough of Juneau*, 923 P.2d 768, 776 (Alaska 1996) (holding that a contract requiring future legislation is unenforceable). Therefore, “[a]s a matter of law, [a person] cannot rely on an extant law as a promise that that law will continue to have the same effect in perpetuity.” *Ross*, 292 P.3d at 915. Thus, a future legislature has the sovereign power to overrule its predecessors. And this is especially so with respect to taxes given the constitutional convention delegates’ “recogni[tion of] the importance of preserving state control over state revenue.” *State v. Ketchikan Gateway Borough*, 366 P.3d 86, 92 (Alaska 2016) (discussing the Alaska Constitution’s general prohibition of dedicated funds in article IX, section 7 and upholding the authority of the legislature to require local contributions to support public schools). The legislature’s ability to revise tax laws is a fundamental component of preserving control over state revenues.

<sup>12</sup> Model State Constitution art. VII, sec. 700 (Nat’l Mun. League, 5<sup>th</sup> ed. 1948).

<sup>13</sup> 3 Constitutional Studies, PAS Staff Paper IX, Vol. 3, State Finance (1955), at 2.

<sup>14</sup> *Id.* at 5.

<sup>15</sup> *Id.* at 15-16.

The Alaska delegates heeded the advice to prohibit surrendering the taxing power, but wanted to retain the authority of the legislature to offer tax exemptions to induce economic development.<sup>16</sup> Initially, the Constitutional Convention Finance and Taxation Committee tentatively adopted the phrase, “the power of taxation shall never be surrendered.”<sup>17</sup> At subsequent meetings the Committee discussed whether tax exemptions should be permitted and, if so, whether the specific exemptions should be included in article IX.<sup>18</sup> On December 16, 1955, the Committee had agreed on language similar to what we have now:

**Section 1. The power of taxation shall never be surrendered; and shall never be suspended or contracted away, except as provided herein. . . . Section 4.** The real and personal property of the State and of its political subdivisions shall be exempt from taxation under such conditions and with such exceptions as the legislature may direct. All or any portion of property used exclusively for non-profit, charitable, cemetery, or educational purposes as defined by law, is exempt from taxation. **Other exemptions of like or different kind may be granted by general law;** and until otherwise provided by law, all exemptions from taxation validly granted are retained.<sup>19</sup>

The only exceptions to the prohibition against suspending or contracting away the taxing authority referenced in section 1 (“except as provided in this article”) are contained in section 4. No other section of article IX speaks to exemptions or other ways in which the State's taxing authority could be suspended or contracted away. Reading section 1 and section 4 together, it is clear that the suspension or contracting away of the taxing power could only be by general law.

A report accompanying the Committee's proposal explained: “The power to tax is never to be surrendered, but under terms that may be established by the legislature, it may be suspended or temporarily contracted away. This could include industrial incentives, for example.”<sup>20</sup>

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<sup>16</sup> See Minutes of Finance & Taxation Committee (Nov. 23, 1955) (“Tax incentives were discussed. It was the consensus of the committee that tax incentives may well be useful in Alaska, that the Constitution should therefore not prohibit them . . .”).

<sup>17</sup> Minutes of Finance & Taxation Committee (Nov. 17, 1955).

<sup>18</sup> Minutes of Finance & Taxation Committee (Dec. 5, 1955).

<sup>19</sup> Committee Proposal No. 9 (Dec. 16, 1955) (emphasis added).

<sup>20</sup> Commentary on the Article on Finance & Taxation (Dec. 16, 1955) at 1 and 5.

The Committee explained to the Convention that the language in Proposal No. 9

is aimed to assure a sound system of finance and taxation and leave as much leeway to the state as possible and the sound practices to be carried out in the future. Section 1 is a rather routine statement that the power of taxation shall never be surrendered or contracted away. The reason for . . . the addition of the words, 'except as provided herein' is to remove doubt as to what we might mean later on down in the article by providing exceptions. . . . [The last paragraph of section 4] would allow for, among other things, a granting of tax incentives to new industries.<sup>21</sup>

It was noted that the Committee did not adopt the Model language or the language used by other state constitutions for section 1; it "felt that definitely the power of taxation should never be surrendered" but also felt "there would possibly be occasion and good justification in the future for such things as allowing an industry-wide exemption to encourage new industry to come in."<sup>22</sup> The allowance in section 4 for exemptions that may be granted by general law is to allow "for some exemption or inducement to industries."<sup>23</sup>

Although a Committee consultant had advised members of the committee to set constitutional time limits for exemptions, the article's plain language and the framers' intent shown in the constitutional minutes render such time limits superfluous.<sup>24</sup> By definition, exemptions "by general law" may be amended or repealed, and the "no surrender" clause of article IX, section 1 makes clear that exemptions may not be treated as an irrevocable contract. Because article IX expressly made exemptions subject to amendment or repeal at any time, the framers had no need to create time limits for these exemptions.

The history of article IX illustrates the framers' intent to prohibit the surrendering of the taxing power but to allow the legislature, by general law, to adopt tax exemptions to encourage economic development in Alaska. The framers also recognized the need to do so in a way that would not result in a binding contractual arrangement that would tie

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<sup>21</sup> Constitutional Convention Minutes, Day 42 (Dec. 19, 1955).

<sup>22</sup> Constitutional Convention Minutes, Day 55 (Jan. 16, 1956).

<sup>23</sup> *Id.*

<sup>24</sup> See Minutes of Finance & Taxation Committee (Dec. 5, 1955) at 1-3 ("[Consultant Weldon Cooper] also advised setting a time limit [for tax incentives] constitutionally.").

the hands of future legislatures. The language of article IX makes clear that the power of taxation cannot be surrendered, and that a tax incentive or exemption “by general law” may be amended or repealed. Nothing in the legislative history or in the plain language of article IX supports a conclusion that the framers intended to permit tax incentives or exemptions that could not be amended or repealed by a future legislature.

**IV. Conclusions by former attorneys general regarding the State's ability to provide fiscal certainty are not supported by article IX's drafting history or plain text.**

Opinions by former attorneys general who have examined the legislative history of article IX in an attempt to support the constitutionality of long-term, irrevocable tax exemptions have focused on aspects of the legislative history that, at best, are inconclusive. These analyses are not supported by either the legislative history or the text of article IX.

A 2006 formal Attorney General's Opinion endorsing the Stranded Gas Development Act (“SGDA”) contract<sup>25</sup> by then-Attorney General David Márquez concluded that the legislature could contract away its sovereign power of taxation for a period of 30 to 45 years.<sup>26</sup> The opinion first summarily concludes that article IX permits the legislature to bind a future legislature by entering into an irrevocable contract.<sup>27</sup> The opinion then goes on to consider the history of the contract clause, noting that “[s]ome states . . . enacted state constitutional prohibitions against the surrender of the taxation power,”<sup>28</sup> but arguing that the framers of the Alaska Constitution “adopted instead the unique clause in article IX giving the Alaska legislature authority to suspend or contract away existing taxing power by providing tax exemptions by general law.”<sup>29</sup> While

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<sup>25</sup> In a 2006 memorandum analyzing the SGDA contract, Senator Hollis French noted that Attorney General Márquez “admitted in his remarks to the group of legislators attending the Administration's gas line contract presentations at Centennial Hall in Juneau that his analysis was not a balanced view of the question of the constitutionality of a long term tax deal, but rather was essentially a defense of the Administration's point of view.” Senator Hollis French, *Alaska's 'No Surrender Clause' and the Proposed SGDA Contract*, June 6, 2006, at 12-13.

<sup>26</sup> 2006 Op. Alaska Att'y Gen. (May 10) (addressing the proposed Stranded Gas Development Act contract).

<sup>27</sup> *Id.* at 13.

<sup>28</sup> *Id.* at 13-14.

<sup>29</sup> *Id.* at 14.



acknowledging that the framers were cautioned that tax exemptions could result in a binding contractual relationship and that limiting legislative powers could retard growth, it nevertheless asserts (without citation to any authority) that the delegates rejected this advice.<sup>30</sup> Yet the memo's conclusions ignore both the express prohibition against surrendering the power to tax and the express proviso that any tax exemptions be enacted only through "general law."<sup>31</sup> These two provisions must be read in harmony: exemptions granted under article IX, section 4 cannot eviscerate the complete bar on surrender of the taxing power found in article IX, section 1.<sup>32</sup> Irrevocable incentives of any duration would be inconsistent with the Constitution's prohibition against surrendering the power to tax. And although the opinion cites minutes from the Finance and Taxation Committee, minutes from the Constitutional Convention, and the Commentary on Article IX in an effort to show that the framers chose to allow one legislature to "alienate" the taxing power through binding tax contracts,<sup>33</sup> none of the authority cited actually supports this conclusion.<sup>34</sup>

To be sure, the Márquez opinion quotes constitutional convention minutes that evince the framers' intent to allow the legislature to use tax incentive to encourage investment from new industry.<sup>35</sup> Yet the mere fact that the framers wanted to allow tax

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<sup>30</sup> *Id.* at 17-18.

<sup>31</sup> Senator Hollis French made this same observation in his 2006 memorandum: "[Attorney General Márquez's] statements ignore the plain meaning of the term 'general law' in article IX, section 4, and the time limits imposed by that term. The memo does not at any place discuss the meaning of the term 'general law,' despite implicitly acknowledging the fact that 'general law' is the operative term." Senator Hollis French, *Alaska's 'No Surrender Clause' and the Proposed SGDA Contract*, June 6, 2006, at 14.

<sup>32</sup> *Hiibschman v. City of Valdez*, 821 P.2d 1354, 1363 (Alaska 1991) (requiring that statutes must be harmonized if possible).

<sup>33</sup> *See id.* at 18-21 (citing minutes of the Finance & Taxation Committee; Commentary on Article IX; Proceedings of the Alaska Constitutional Convention).

<sup>34</sup> In his 2006 memorandum, Senator Hollis French similarly points out that while "[m]uch of the legal analysis in General Márquez'[s] memo consists of a noncontroversial recitation of federal law regarding the Contracts Clause and a summary of how Alaska's constitutional convention drafted and debated the 'no surrender' clause," "General Márquez'[s] memo . . . pushes beyond the historical record . . ." Senator Hollis French, *Alaska's 'No Surrender Clause' and the Proposed SGDA Contract*, June 6, 2006, at 13-14.

<sup>35</sup> *See* 2006 Op. Alaska Att'y Gen. at 18-22 (May 10) (quoting Proceedings of the Alaska Constitutional Convention (Jan. 16-18, 1956)).

exemptions does not mean that the framers wanted these exemptions to be irrevocable. Thus minutes showing a desire to encourage “new industry” or “outside capital” cannot override the plain language of article IX, which prohibits surrender of the taxing power.<sup>36</sup>

Finally, the Márquez opinion notes that the Finance and Taxation Committee was advised to adopt a time limit for tax exemptions<sup>37</sup> but ultimately did not provide a durational limit for exemptions.<sup>38</sup> It concludes that the framers “deliberately rejected putting parameters around what would constitute a temporary tax incentive,” and thus a tax contract that binds future legislatures for up to 45 years would be permissible.<sup>39</sup> Again, this conclusion is contrary to the plain text of article IX, which states that the power of taxation shall never be surrendered, and that tax exemptions may be provided “by general law.” A better explanation for the absence of a durational limit in article IX is that no such limit was required. The framers had determined that exemptions “may be

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<sup>36</sup> In a 60-page memorandum regarding the State's authority to enter fiscal contracts (an earlier version of which Attorney General Márquez appears to have been familiar with), BP senior counsel and former Alaska Department of Revenue commissioner Tom Williams also draws conclusions that are not supported by the extensive constitutional history he cites. For example, Williams points to a sentence deleted by the framers to support his conclusion that the framers intended to allow binding fiscal contracts. On December 6, 1955, members of the Committee on Finance and Taxation agreed to delete the following sentence from the end of article IX, section 4: “Exemptions from taxation may be allowed, altered or repealed.” Memo dated November 22, 1955 from Committee on Finance & Taxation materials. Citing the deletion of that sentence, Williams argues that the framers “affirmatively delet[ed] the very language . . . that would have reserved a power to ‘alter[] or repeal[]’ any tax exemption even when it was contractually based.” *The State of Alaska's Legal Authority to Enter Contracts to Limit or Lock-In Taxes for a Particular Project or Industry*, Tom Williams, April 16, 2015, at 19. A far better explanation for the deletion of the sentence is that it was superfluous. Two sentences before the deleted sentence was the following sentence, which remained: “Exemptions from taxation may be granted only by general laws.” This, together with the “no surrender” clause, made clear that exemptions from taxation (whether through suspension or contracting away of the taxing power) may be allowed, altered or repealed.

<sup>37</sup> See Minutes of Finance & Taxation Committee (Dec. 5, 1955) at 1-3 (“[Consultant Weldon Cooper] also advised setting a time limit [for tax incentives] constitutionally.”).

<sup>38</sup> 2006 Op. Alaska Att’y Gen. at 21 (May 10) (“In spite of Dr. Cooper’s urging, the committee chose not to adopt a specific durational limit for tax exemptions for the express purpose of avoiding constitutional questions.”).

<sup>39</sup> 2006 Op. Alaska Att’y Gen. at 20-21 (May 10).

granted by general law,” and general laws may be repealed at any time.<sup>40</sup> This does not mean that the legislature cannot provide a tax exemption for a specific duration or authorize a tax exemption by contract. But because of the “no surrender” clause, a taxpayer can only rely on such exemptions until they are amended or repealed.

A 2007 letter by then-Attorney General Talis Colberg to Senator Hollis French and Representative Jay Ramras also concluded that the Alaska Gasline Inducement Act (“AGIA”), which offered a ten year production tax exemption to parties that committed gas in the first binding open season, would constitute a constitutionally permissible binding tax contract. The letter begins by rejecting the Márquez opinion’s conclusion that the SGDA contract would be constitutional under article IX.<sup>41</sup> But the letter then concludes that AGIA, which was much more “narrowly focused” than SGDA and took “a specific and limited approach to reducing the potential for production tax changes for parties that commit their gas to the pipeline licensed under [AGIA],” was “consistent with the State’s past practices and the Alaska Constitution.”<sup>42</sup> The letter argues that section 4 provides authority for the legislature to set a tax exemption by contract and that “[w]ithout this authority, the clause ‘except as provided in this article’ would have no meaning.”<sup>43</sup> The letter thus suggests that the legislature can “by general law” create a binding contract. Yet this interpretation, like that of the 2006 Márquez opinion, ignores the “no surrender” clause of section 1.<sup>44</sup> Finally, Attorney General Colberg clarifies the distinction between AGIA, which he believes is a permissible tax contract under article IX, and SGDA, which went too far:

While I believe that the Alaska Constitution provides some limited mechanism for industrial incentives through binding tax exemptions,

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<sup>40</sup> To conclude that the framers intended to allow for tax contracts that could not be amended or repealed yet provided no time limit for such contracts is also contrary to the clear record that the framers were warned about and discussed the dangers of alienation of the taxing power through exemptions and were advised to set a time limit constitutionally. *See* Minutes of Finance & Taxation Committee (Nov. 21, 1955) (“Tax exemptions and the alienation of taxing power were discussed at length.”).

<sup>41</sup> Letter from T. Colberg to Sen. H. French and Rep. J. Ramaras, at 1 (March 13, 2007).

<sup>42</sup> *Id.* at 2.

<sup>43</sup> *Id.* at 3.

<sup>44</sup> And, as discussed previously, an interpretation that would not render superfluous the “except as provided in this article” as it relates to the “contracted away” portion of section 1 is that the legislature may enter into non-binding contracts.

in my view former Attorney General Márquez's opinion on this topic, while thorough and well researched, reached too far in its conclusion that the SGDA contract would survive constitutional scrutiny. Rather, the most likely and defensible interpretation of Art. IX is that a legislature may agree to some binding tax treatment such as proposed in the AGIA, which is limited to exemptions, is limited in duration, and demonstrably serves an important public purpose.<sup>45</sup>

Like the Márquez opinion, the Colberg letter fails to address the definition of "general law" and ignores the "no surrender" clause of section 1. In doing so, it incorrectly concludes that the legislature may enter into binding tax contracts by general law. While the letter correctly concludes that SGDA was not supported by the constitution, it offers no support for its conclusion that binding tax treatment would be permissible if it was limited to exemptions, limited in duration, and demonstrably served an important public purpose.

Finally, both the Márquez opinion and the Colberg letter point to industrial incentive acts that were enacted before and after the adoption of article IX to support their conclusions that the framers intended to allow the legislature to provide binding tax incentives "that were contractual in nature."<sup>46</sup> Between 1949 and 1968 there were three industrial incentive acts, each providing for up to ten years of tax incentives.<sup>47</sup> Although some of these acts indicate that they were intended to be contractual in nature,<sup>48</sup> nothing

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<sup>45</sup> Letter from T. Colberg to Sen. H. French and Rep. J. Ramaras, at 4 (March 13, 2007).

<sup>46</sup> 2006 Op. Alaska Att'y Gen. at 16-17 (May 10) ("Indeed, immediately before and after the constitutional convention, both the Alaska territorial and state legislatures adopted industrial incentive acts providing tax exemptions and other incentives to businesses investing in Alaska that were considered contractual in nature. Several delegates to the convention were members of the legislature when these acts were enacted."); 2007 Letter from T. Colberg to Sen. H. French and Rep. J. Ramaras, at 3 (March 13, 2007) ("In fact, the legislature has on several occasions previously provided statutory tax exemptions that were described as having the force of contracts.").

<sup>47</sup> Ch. 10, SLA 1949; AS 43.25.010 and 040; AS 43.26.020 (Repealed § 63 ch. 37 SLA 1986).

<sup>48</sup> The Alaska Property Tax Act of 1949 constituted "a contract between the [local] taxing unit, and the owner of the property." H.B. 43, § 2, approved March 16, 1953. The Alaska Industrial Incentive Act of 1957 provided for a ten-year tax exemption certificate that, if granted, was deemed binding and in full force and effect upon the terms set for the period granted. AS 43.25.010 *et seq.* The Alaska Industrial Incentive Tax Credits Act of

in these acts stated that they were not subject to amendment or repeal. In addition, the only act adopted after the ratification of article IX—the 1968 Alaska Industrial Incentive Tax Credits Act, which allowed for the granting of tax credits that could be used for a period of up to ten years—was never challenged in court. There is therefore no evidence that the Act was constitutional under article IX. That these acts provided for tax exemptions for up to ten years is immaterial. As discussed earlier, the legislature is free to grant a tax exemption by general law for a specified duration, but that exemption will be subject to amendment and repeal.

An apparent flaw in the opinions that suggest a long-term, irrevocable tax exemption would be permissible under article IX is their failure to address the definition of the term “general law” and the significance of that definition when read in concert with the “no surrender” clause. Article IX provides (and the framers intended) that tax exemptions not already provided for in article IX may be granted “by general law.” As such, any temporary suspension or contracting away of the taxing power “by general law” would be subject to amendment or repeal by a future legislature. When read in concert with the “no surrender” clause of section 1, it is also clear that a general law authorizing a contract or a general law treated as a contract would also be subject to amendment or repeal.<sup>49</sup> There is nothing in the constitutional history that supports a conclusion that the framers intended to permit one legislature to provide tax exemptions, either through general law or contract, that a future legislature could not amend or repeal.

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1968 granted a tax credit “effective for a period . . . not to exceed 10 years from the date of the grant . . .” AS 43.26.010(a).

<sup>49</sup> This is consistent with the Alaska Supreme Court’s interpretation of article IX. In *Atlantic Richfield Co. v. State*, 705 P.2d 418, 438 (Alaska 1985), the court, citing article IX section 1, stated: “In entering into the [oil and gas] leases the state could not, and did not, contract away its power as a sovereign to tax income earned in the state.” It is also the opinion provided by Legislative Counsel Don Bullock in a 2006 memorandum to Representative Les Gara, in which Mr. Bullock concluded: “In my opinion, a contract provision limiting the level of a tax is more likely than not contrary to art. IX, sec. 1 and is not within the exceptions in art. IX, sec. 4. . . . Article IX, sec. 4 provides for exemptions from tax provided by law. In other words, exemptions may be enacted by the legislature (and repealed or amended by a subsequent legislature), but there is no authority in the Constitution of the State of Alaska to suspend the power of the state to tax in a contract between the state and a taxpayer. . . . A suspension or exemption may be amended or repealed by a subsequent legislature or an initiative under the power to tax.” Memorandum regarding “Contracting away the power of taxation” from D. Bullock to Rep. L. Gara, May 18, 2006, at 1, 4, 6.

**V. Past fiscal certainty proposals are inconsistent with the framers' intent and are not permitted by article IX.**

The various fiscal proposals made by oil and gas producers ("producers") over the years in an attempt to obtain fiscal certainty from the State of Alaska prior to committing to produce North Slope natural gas have not proposed fiscal certainty through revocable tax exemptions by general law to encourage new industry. Proposals to irrevocably suspend or contract away the state's taxing power to benefit specific companies in an established state industry are neither authorized by the plain language of article IX nor consistent with the delegates' purpose in allowing tax exemptions.

The commentary that accompanied article IX provides the only direct explanation of what the framers intended when drafting article IX:

The power of taxation is never to be surrendered, but under terms that may be established by the legislature, it may be suspended or temporarily contracted away. This could include industrial incentives, for example. . . . The legislature is authorized to make further tax exemptions to encourage, among other purposes, new industry, and all valid current exemptions are continued.<sup>50</sup>

When Finance and Taxation Committee Secretary Barrie White presented the commentary to the Convention on December 19, 1955, he stated the following regarding Sections 1 and 4:

Section 1 is a rather routine statement that the power of taxation shall never be surrendered or contracted away. . . . Section 4 deals with exemptions from taxation, most of it is pretty standard . . . . And then in the last paragraph of that section it provides that other exemptions may be provided by general law. This would allow for, among other things, for a granting of tax incentives to new industries.<sup>51</sup>

The plain text of article IX, the accompanying commentary, and the explanation provided by Secretary White at the Convention emphasize three things: that the power of taxation could never be surrendered, that exemptions "of like or different kind" than those

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<sup>50</sup> Commentary on the Article on Finance & Taxation (Dec. 16, 1955) at 1 and 5.

<sup>51</sup> Constitutional Convention Minutes, Day 42 (Dec. 19, 1955).

enumerated in section 4 could be provided by general law, and that the founders intended for those exemptions to be used as incentives for "new industries."

Previous Attorneys General have concluded that providing tax incentives for a natural gas project would be consistent with what the framers intended because it would encourage resource development,<sup>52</sup> or serve an "important public purpose."<sup>53</sup> For example, Attorney General Márquez cited Article VIII's mandate to develop the state's gas for the maximum benefit of the citizens of Alaska to support his conclusion that the Stranded Gas Development Act contract was constitutionally permissible.<sup>54</sup> But the constitutional history of article IX makes clear that the intent was to provide industry-wide incentives to new industries not yet in Alaska,<sup>55</sup> not tax relief to specific companies within an industry that has been established in the State for decades.<sup>56</sup>

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<sup>52</sup> In his 1998 SGDA bill review, Attorney General Botelho noted that the legislature has passed "comparable measures to encourage industrial development in the past," and suggested that the Kenai LNG plant "might never have been built" without the tax advantages of former AS 43.25. Bill Review of SCS CSHB 393(FIN), at 4 (May 29, 1998). Again, past examples of unchallenged tax incentives do not support a conclusion that such measures are constitutional under article IX.

<sup>53</sup> Letter from T. Colberg to Sen. H. French and Rep. J. Ramaras, at 4 (March 13, 2007).

<sup>54</sup> Attorney General Márquez avoided addressing whether the proposed Stranded Gas Development Act contract was a permissible industrial incentive based on the constitutional history of article IX and instead looked to article VIII: "The proposed [Stranded Gas Development Act] Contract is consistent with article VIII's mandate to develop the state's gas for the maximum benefit of Alaska citizens and fits within the parameters of sections 1 and 4 of article IX. Commentary by the delegates regarding article VIII makes it clear that all saw it as allowing for the development of the state's vast resources to benefit future Alaskans." 2006 Op. Alaska Att'y Gen. at 25 (May 10).

<sup>55</sup> *See, e.g.*, Constitutional Convention Minutes, Day 55 (Jan. 16, 1955)("[W]e did feel that there would possibly be occasion and good justification in the future for such things as allowing an industry-wide exemption to encourage new industry to come in and that is the reason for the particular wording there. . . . [A]nd this . . . is the provision that allows for some exemption or inducement to industries or similar things.").

<sup>56</sup> In his 2006 memo to the legislature, Senator Hollis French provided a quote from Vic Fisher who concluded the same: "Given the constitution's history, it is totally inconceivable that the framers of Alaska's constitution would have meant the ['no surrender' clause] to include surrender of its power of taxation over the petroleum industry that already exists and is so established that it provides 80-90% of general fund revenues. Industrial incentives of that scale and scope just didn't exist and would defy

Moreover, proposals like the SGDA far exceed the tax incentives of general applicability envisioned by the founders. Under SGDA, the State entertained providing tax exemptions through a statute authorizing a fiscal contract that would have been authorized by the legislature and signed by the governor. The SGDA contract would have provided up to 45 years of tax incentives by exempting Exxon, ConocoPhillips, and BP from certain state and municipal taxes. Though authorized by statute that was general on its face, the SGDA contract applied only to three established producers with large oil and gas reserves. The contract, which proposed to fundamentally alter the tax structure of the State of Alaska for up to 45 years for three specific producers, was therefore inconsistent with the proviso that tax exemptions be conferred by "general law," had nothing to do with "new industries," and thus could not be a valid tax exemption under article IX.<sup>57</sup> Even Attorney General Colberg, who defended AGIA as a permissible tax exemption under article IX, concluded that the SDGA was not constitutionally permissible: "I do not believe that a contractual lock-up of the state's fiscal system and other elements of state sovereignty for over three decades is either in the public's interest or supported by Art. IX, Sec. 1 of the Alaska Constitution."<sup>58</sup>

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logic." Senator Hollis French, *Alaska's 'No Surrender Clause' and the Proposed SGDA Contract*, June 6, 2006, at 7 (quoting Vic Fisher Testimony submitted at June 3, 2006 Alaska Gas Pipeline Public Hearing, Anchorage, Alaska, page 4-5).

<sup>57</sup> In a 1998 bill review concerning the SDGA, Attorney General Bruce Botelho noted that the SGDA as drafted did not bind future legislatures and indicated that it would have been unconstitutional had it purported to do so: "The [SGDA] raises the 'surrender of the taxing power' question because it contemplates development of a long-term contract that reflects the fiscal terms applicable to the sponsors of a stranded gas project. The legislation itself, however, is not unconstitutional under art. IX, because it does not purport to bind future legislatures. Instead, it merely authorizes the commissioners of revenue and natural resources to develop appropriate contract terms. . . . Even if [legislative] authorization is given, the legislature may expressly provide that the contract's fiscal terms are binding only so long as no future legislature decides to exercise the taxing power in a different way. In other words, the 'surrender of the taxing power' issue may never arise." Bill Review of SCS CSHB 393(FIN), at 3 (May 29, 1998).

<sup>58</sup> 2007 Letter from T. Colberg to Sen. H. French and Rep. J. Ramaras, at 1 (March 13, 2007). Former Assistant Attorney General Jack Griffin, now counsel at ConocoPhillips, also concluded that such a contract would be unconstitutional in a PowerPoint presentation provided to the legislature in 1998: "A contract that prohibits future legislatures from amending or repealing tax exemptions or from imposing new tax obligations upon an individual or corporation, is a surrender of the taxing power that is



Nor can the “no surrender” and “general law” provisions of article IX be circumvented through alternative fiscal certainty mechanisms.<sup>59</sup> For example, an agreement between producers and the State wherein the State or a political subdivision would agree to reimburse the producers for any increases in taxes that occurred during a specified period would be a clear evasion of the prohibition against the surrender of the power of taxation in article IX. By agreeing to compensate producers for tax increases through a reduction in state revenues, the legislature would, in effect, be agreeing to surrender its power of taxation.<sup>60</sup>

In contrast to the SGDA contract, the AGIA provided a production tax exemption by general law for the first ten years of operation for parties that committed gas to the pipeline in the first binding open season.<sup>61</sup> In his 2007 letter to legislators, Attorney General Colberg incorrectly suggested that the tax incentives under AGIA would be “binding,” writing: “a legislature may agree to some binding tax treatment such as proposed in the AGIA, which is limited to exemptions, is limited in duration, and demonstrably serves an important public purpose.”<sup>62</sup> But AGIA did not purport to bind future legislatures and would have been subject to amendment and repeal. An industry-wide tax exemption by general law to induce outside investment or new industry that is

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prohibited by Article IX, Section 1 of the Alaska Constitution. To the extent the legislature may ‘contract away’ the taxing power, it may do so only by general law, which is to say that the ‘contract’ is subject to repeal or modification by any future legislature.” Jack Griffin PowerPoint slides attached to March 27, 1998 letter from Jack Griffin to Representative Terry Martin, at DOL\_005967.

<sup>59</sup> Attorney General Márquez suggested that a payment in lieu of taxes would be more defensible than traditional industrial incentive acts, writing: “Moreover, unlike the earlier Incentive Acts, the proposed SGDA contract requires continuous payments in lieu of taxes, not a complete exemption from payment of taxes.” 2006 Op. Alaska Att’y Gen. at 24 (May 10). A binding contract authorizing a payment in lieu of tax would still constitute a surrender of the taxing authority and would therefore violate article IX.

<sup>60</sup> In his 2007 letter to members of the Alaska Legislature, Attorney General Colberg wrote that such provisions in the SGDA, including proposed indemnification of tax payments made by North Slope producers and offset of tax payments directly against state royalty revenues, were “antithetical to state sovereignty.” 2007 Letter from T. Colberg to Sen. H. French and Rep. J. Ramaras, at 2 (March 13, 2007).

<sup>61</sup> AS 43.90.320.

<sup>62</sup> Letter from T. Colberg to Sen. H. French and Rep. J. Ramaras, at 4 (March 13, 2007).

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subject to amendment or repeal is the only form of fiscal certainty currently permitted by article IX.

## **CONCLUSION**

The Alaska Constitution unequivocally prohibits the State from surrendering its power of taxation. However, the State can suspend or contract away the power of taxation as specifically allowed in article IX. Section 4 of that article allows the legislature to enact general laws for tax exemptions. While the Alaska Supreme Court has not yet addressed this question, this limited power to create tax exemptions must be harmonized with the prohibition against surrender of the taxing power. As such, the State cannot under the constitution as now written—by contract or by legislation—create a permanent tax structure. Therefore, any contract or suspension of taxing power through a general law is subject to repeal or amendment by future legislatures, and cannot be binding under the contract clause. A general law or contract that purported to prohibit the legislature from changing tax terms in the future would be unconstitutional.

Sincerely,

Craig W. Richards  
Attorney General